No. 94-521

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1994

ROBERT L. VERNON,

*Petitioner,*

v.

CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES; BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES; ZEV YAROSLAVSKY, Individually and as Los Angeles City Councilman; STANLEY SHEINBAUM, Individually and as Commissioner, Board of Police Commissioners; JESSE BREWER, Individually and as Commissioner, Board of Police Commissioners; and MELANIE LOMAX, Individually and as former Commissioner, Board of Police Commissioners,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY

### I. RESPONDENTS AVOID THE SINGLE ISSUE WHICH THIS CASE PRESENTS: THEIR CALL FOR INVESTIGATION OF A PUBLIC EMPLOYEE'S RELIGIOUS BELIEFS AND ASSOCIATIONS.

The Brief in Opposition bids the Court to ignore the core of this case: the incontestable fact that respondents ordered an investigation, *not only of a public employee's conduct in office, but of his religious views and associations.* See Petition, 3-6, 12-13. Like a black dot on a white wall, that is the dispositive fact before this Court.

In three ways respondents seek to divert the scrutiny of the Court from the case's central issue:

1. *By Representing That Respondents Never Intended an Investigation of Mr. Vernon's Beliefs and Religious Associations.* Respondents make much of the professions of key respondents that they sought *only* an inquiry into conduct, not a religious inquiry. The respondent Sheinbaum, for example, is cited as having stated, *on June 4*, 1991, that the Commission did not intend the latter. (Brief, 6). That profession *followed* Mr. Vernon's outcry on KNBC-TV *June 3* protesting the mandate for what it was – a call for investigation of both his conduct and his religion. Sheinbaum, in his very statement, could not resist return to the flawed theme of the mandate – that "the only question . . . is whether any of those *views* [religious views] impact on his performance." How would that be ascertained without scrutiny of those views? That respondents plainly sought such scrutiny is shown even in the conjured "Question Presented" in their brief – namely, the admission that they sought to ascertain "if a high-ranking

official is impermissibly *injecting his views* into the workplace." (Brief, 1, emphasis supplied). The respondents' prurient anxiety over those views had already been seen in Sheinbaum's revealing public statement of May 25, that he "want[ed] to know if [Vernon] *still holds these views* . . . " (CR 95, p. 153, Sheinbaum's dep. Emphasis supplied).

The mandate was not sanitized by its relating a religious inquiry to on-duty conduct. The only inquiry which constitutionally could have been made was one limited to conduct and entirely isolated from beliefs. To step into a public employee's religion and presumed religious motivations and beyond his adherence to the letter of the secular laws and regulations governing a public employee's conduct, is to violate the First Amendment. Mr. Vernon has repeatedly insisted that *any* such failure of adherence on his part *should* be investigated. But that is not the action of which he has complained. That action is the religious investigation. And respondents, in spite of all dodging, are stuck with it.

2. *By Seeking to Focus the Court on Allegations of Misconduct by Robert Vernon.* Respondents open their brief by devoting eight pages to an accumulation of accusations (by a handful of persons from the 8,400 member LAPD), resulting in a picture of Mr. Vernon as an untrustworthy, rabidly religious fanatic.[1] The purported aim of

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[1] Respondents, throughout this litigation, have put a spin on truth at point after point. See Petition, 14, fn. 10. John Henry Newman, in his celebrated reply to Dr. Kingsley, referring to the latter's tactic of "poisoning the wells," remarked: "There is the story of a sane person being by mistake shut up in the wards of a

these recitations is to show that respondents were justified in ordering an investigation. If the allegations were credible, respondents would be correct in mandating investigation of Mr. Vernon's on-duty conduct. But respondents' whole recital is irrelevant to this case's issue, since *no* misconduct by a public employee can justify government officials in ordering investigation of a public employee's religious beliefs and associations. Equally irrelevant, but in strict accord with ethical standards, would have been evidence, possessed in abundance by respondents, of Mr. Vernon's 34-year career of distinguished and honorable service in the LAPD, characterized always by fairness and strict observance of LAPD regulations.[2]

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lunatic asylum and that, when he pleaded his cause to some visitors visiting the establishment, the only remark he elicited in answer was "How naturally he talks! You would think he is in his senses." J.H. NEWMAN, APOLOGIA PRO VITA SUA. (Everyman Ed., 13).

[2] Maxwell E. Greenberg, Honorary National Chairman of the Anti-Defamation League of B-nai B-rith, had numerous occasions to assess Chief Vernon's job performance while Mr. Greenberg was a member of the Los Angeles Board of Police Commissioners from 1980-1984. He found Mr. Vernon to be "a man of honesty and integrity", who "performed his job duties as Assistant Chief in a competent, fair and unbiased manner." Mr. Greenberg declared, "In the numerous instances in which Chief Vernon appeared before the Board, and worked with me as a member of the Board, there was no action taken by Chief Vernon (nor any implied motivation for such action) from which I inferred (or could infer) any improper intrusion of his religious beliefs into the performance of his duties." (CR 59, p. 1-2, Greenberg decl.)

3. *By Misrepresenting the Investigation Conducted by Chief Gates.* Respondents seek to bolster their claim that they sought an investigation solely of Mr. Vernon's on-duty conduct by a completely misleading depiction of the role played by Chief Gates in respect to the mandate. Selectively quoting Gates, at page 6, the brief recites that Gates said he received a memorandum "that an investigation be conducted into . . . the *on-duty activities* of Assistant Chief Robert Vernon . . . The inquiry was limited to the *on-duty activities* of Chief Vernon . . . Chief Vernon's religious views were not the subject of the investigation." (Emphasis by respondents). *Of course* investigation of Mr. Vernon's on-duty activities was ordered. That is a given in the case. Of course, too, his religious views were not investigated. But why were they not? Respondents are again shy of the whole truth. Chief Gates had at once denounced the mandate as a "witch hunt," "specifically aimed at Bob Vernon's religious views, period." (CR 95, pp. 745, 247, Gates dep.) He flatly refused to carry out *such* an order.

A further disturbing aspect of the Brief in Opposition is respondents' ambivalent attitude toward Chief Gates. Gates, so they admit, was the official expressly chosen by the Commission to investigate Mr. Vernon. Respondents are then forced to admit that Gates "reported to the Board that his investigation had not produced any evidence of wrongdoing by Vernon." (Brief, 7). Evidently anxious now to discredit this finding by their chosen agent, that Mr. Vernon was, in spite of all the reckless charges against him, blameless, respondents drop a footnote, adroitly, to convey to the Court that Chief Gates was, after all, quite unreliable:

> In point of fact, as Yaroslavsky feared and suspected, it appears that Chief Gates and his office made little or no real effort to investigate the allegations of Vernon's misconduct.

(Brief, 7). In this remarkable inconsistency, respondents disclose less the unreliability of Chief Gates than of themselves.

## II. RESPONDENTS' CONSTITUTIONAL ARGUMENTS ARE IRRELEVANT.

Respondents argue that "government is entitled to take action to avoid violations of the Establishment Clause and the anti-discrimination statutes." (Brief, 15). Of course, it is. But *what* action? Again, respondents duck the Question Presented. Respondents present a straw man: " . . . Vernon points to no split among the circuits in either of those regards." (*Ibid.*) Of course, he didn't, of course there isn't, and of course the point is meaningless.

## CONCLUSION

As respondents admit (Brief, 16), this case is one of "highly unusual facts." The two lower courts regarded it as unprecedented. For that reason, as well as for all the reasons stated in the petition, the petition should be granted.

Respectfully submitted,

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